

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY TODD MANUEL,

Defendant-Appellant.

UNPUBLISHED

July 18, 1997

No. 186641

Cheboygan Circuit Court

LC No. 94-001227-FH

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant was charged with domestic assault, MCL 750.81(2); MSA 28.276(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was convicted, following a jury trial, only of the felon in possession charge. He was sentenced to 2-1/2 to 5 years' imprisonment and he appeals as of right. We reverse and remand.

Defendant's conviction arose out of charges that he assaulted his wife. During the course of the police investigation into the allegations of domestic assault, Cheboygan Public Safety officers discovered that defendant had a firearm in his apartment, in violation of his parole agreement. Although the firearm was not involved in the domestic dispute, officers seized the weapon and charged defendant with being a felon in possession of a firearm.

Defendant argues that the trial court erred in denying his motion to sever the charges for separate trials. We agree. Before jury selection, and again before trial, defense counsel moved for severance, which the trial court denied. Because the resolution of this issue involves a question of law under MCR 6.120, review is de novo. *Dekoning v Dep't of Treasury*, 211 Mich App 359, 361; 536 NW2d 231 (1995).

Under MCR 6.120(B), on the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of MCR 6.120(B), two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

In *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977),¹ our Supreme Court explained what constitutes the same conduct or a series of connected acts that would permit joinder for trial:

The commentary accompanying the [ABA Standards Relating to Joinder and Severance] explains that "same conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank."

The *Tobey* Court acknowledged that a judge has "no discretion to permit the joinder for trial of separate offenses committed at different times unless the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." *Id.* (quoting ABA Standard 1.1).

Here, the record clearly establishes that the domestic assault charge did not involve the firearm. Rather, the assault charge was based on allegations that after a quarrel concerning his drinking, defendant punched his wife in the head. There is no testimony in the record suggesting that defendant ever threatened his wife with the gun. There is simply no evidence that the two charges arose from the same conduct, or were a series of connected acts or acts constituting part of a single scheme or plan. Further, given the inherent difficulty in determining the factors considered in the jury's deliberation, we find that the court's failure to sever the offenses for separate trials prejudiced defendant. See *People v Aikin*, 66 Mich 460, 472; 33 NW 821 (1887). Most notably, as discussed below, the trial court's failure to sever the trials impacted defendant's ability to assert the spousal privilege. Because defendant was prejudiced by the trial court's failure to sever the charges for separate trials, reversal is mandated.

We also find that defendant's statutory right to assert the spousal privilege was violated. The spousal privilege bars one spouse from testifying against the other without the other's consent, with certain exceptions. The barred testimony may concern any matter, whether it occurred within the marriage or without, as long as the parties are still married. *People v Vermeulen*, 432 Mich 32, 35; 438 NW2d 36 (1989), quoting MCL 600.2162; MSA 27A.2162. As none of the exceptions allowing such testimony are applicable to the present case, the trial court correctly ruled that the privilege was applicable to defendant's wife testimony concerning the firearm.²

The record establishes that during trial, despite the trial court's ruling, the prosecution made several references to defendant's wife's involvement in the firearm seizure. In fact, during closing argument, the prosecutor stated:

[Defendant's wife] never had possession of the gun, and in his wife's own testimony she doesn't mention anything about her husband asking her to take possession of the gun, not a word.

In *People v Werner*, 225 Mich 18, 21-22; 195 NW 697 (1923), the prosecutor called the defendant's husband to the stand and the defendant was forced to raise an objection in the presence of the jury. The Michigan Supreme Court ruled that "it was reversible error to compel defendant, in order to preserve her right under the statute, to object to the violation of the statute and thereby be placed in the position of keeping testimony from the jury." *Id.* at 22. "It is clear, then, [that] the defendant in a criminal case should not be forced to state an objection at trial in order to prevent the State from violating the [spousal privilege] statute." *People v Clarke*, 366 Mich 209, 213-214; 114 NW2d 338 (1962).

Here, because of the prosecution's improper references, defendant was forced to state objections during trial, on at least three occasions, in order to prevent the prosecution from violating his statutory right to the spousal privilege. Further, the prosecution's references were prejudicial and likely influenced the jury. Finally, we recognize that the trial court gave a curative instruction, attempting to remedy the error. The court's instruction, however, could not have cured the prejudice, particularly where the instruction did not even address the prosecution's improper references to the spousal privilege. We therefore find that defendant was denied a fair and impartial trial and reversal is warranted on this basis as well.

Defendant also claims that the trial court erred in failing to suppress the evidence of the firearm because the search was invalid. Because we reverse defendant's conviction on other grounds, we need not address this issue.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Robert P. Young, Jr.

¹ MCR 6.120(B) is a codification of the Supreme Court's decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977).

² The privilege was not available, of course, to the domestic assault charge. MCL 600.2162; MSA 27A.2162.